TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]305

BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 15, 1922.

(28,768)

(28,768)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 813.

BALTIMORE AND OHIO RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 20, 1922.

1 1. *Petition and Exhibits "1" and "2".*

Filed February 9, 1921.

In the Court of Claims of the United States.

No. 39-A.

BALTIMORE AND OHIO RAILROAD COMPANY

vs.

THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner respectfully shows unto your honors the following facts:

1. Petitioner is a corporation organized under the laws of Maryland and operates, and at the time hereinafter stated did
2 operate, a system of railroads in Interstate Commerce. That prior to November 12, 1918, and during the month of December, 1917, your petitioner entered into an informal or implied agreement with the United States on account of negotiations between Col. Amos W. Kimball, an officer or agent acting under the authority, direction, or instruction of the Secretary of War of the United States, and W. T. Moore, of Locust Point, Maryland, an agent of your petitioner, for the conversion of the transfer shed of your petitioner adjacent to Baltimore and Ohio Railroad Company, Pier 6, at Locust Point, Baltimore, Maryland, to a barracks and the installation of necessary plumbing and certain other facilities therein for the accommodation of soldiers of the United States Army, and the building of an additional barrack building 25′ 4″ x 53′ 6″ to the east of said transfer shed equipped with plumbing and other facilities for the accommodation of officers of the said United States Army. The construction of said buildings and facilities heretofore set forth involved the abandonment of certain railroad tracks of your petitioner located at and near the aforesaid-described buildings. The buildings and facilities were constructed by your petitioner to meet the needs of the War Department of the United States at the request of Col. Amos W. Kimball, the Expeditionary Quartermaster of the said War Department at Locust Point, Baltimore, Maryland, and no written agreement was executed between the United States and your petitioner for the construction of the said buildings and facilities in the manner prescribed by law. There is due petitioner from the United States $27,117.25 for the con-

struction of said buildings and facilities, in which amount is included the sum expended for labor and material as well
3 as the estimated cost, less salvage, of restoring the several buildings and property to its original condition.

2. The nature, terms, and conditions of the informal or implied agreement in the matter of this claim are as follows:

Col. Amos W. Kimball, Expeditionary Quartermaster of the United States Army at Baltimore, Maryland, called upon Mr. W. T. Moore, Terminal Agent of the Baltimore and Ohio Railroad Company at Locust Point, Maryland, during December, 1917, and inquired as to the possibility of obtaining from your petitioner additional quarters at Locust Point, Maryland, for quartering soldiers of the United States and represented that such additional quarters were urgently needed for them on account of the extreme weather conditions and the unsuitable character of quarters then existing; also on account of the additional United States troops he expected would be assigned to the territory at and adjacent to Locust Point, Maryland. Mr. Moore immediately took up with the then Vice-President of the Baltimore and Ohio Railroad Company, J. M. Davis, the matter of providing suitable quarters for the aforesaid soldiers and the matter was in turn promptly referred to the then General Manager of the Baltimore and Ohio Railroad Company, R. N. Begien, for proper action. Mr. Begien immediately thereafter authorized the Chief Engineer of the Baltimore and Ohio Railroad Company to remodel and add an addition to the transfer shed for barracks purposes adjacent to Baltimore and Ohio Railroad Company, Pier 6, Locust Point, Baltimore, Maryland, and install necessary plumbing and other facilities therein and to construct an additional barrack building 25′ 4″ x 53′ 6″ to the east of said
1 transfer shed and equip it with plumbing and other facilities, in accordance with the wishes of Col. Amos W. Kimball, Expeditionary Quartermaster of the United States Army, who desired same done by reason of the urgent necessity of the situation, due to the extreme weather conditions prevailing and to the lack of space necessary for proper housing of the United States troops stationed at Locust Point, and in addition to do such other work in connection therewith as was necessary to be done. The construction of the said buildings and facilities was authorized and carried out by your petitioner solely to meet the needs of the War Department of the United States and the same were accepted and used solely by the said War Department for the quartering of its troops. The facilities and buildings constructed by your petitioner as hereinbefore set forth are of no value to it for railroad purposes, and no part of such expenditure for said construction would have been made in the normal development of the company's property; therefore the claimant requests and demands it be reimbursed for the entire cost of the said facilities, plus the cost (less salvage) of restoring the said property to its original condition.

3. Your petitioner hereto annexes to this petition (Exhibit 1) Detailed statement showing the cost of building and facilities con-

structed and work done by your petitioner under the said informal or implied agreement as hereinbefore set forth, amounting to twenty-seven thousand one hundred and seventeen dollars and twenty-five cents ($27,117.25); (Exhibit 2) Map showing description of buildings and facilities constructed by your petitioner at Locust Point, Maryland.

5 4. Petitioner presented its said informal or implied claim in the amount of $44,678.98 on June 27, 1919, to the War Department under the provisions of the act of March 2, 1919, 40th Statute L., 1272. The said claim was amended on March 11, 1920, and the amount reduced to $27,117.25. A hearing was had on it May 18 and 19, 1920, before the Claims Board, Transportation Service, War Department. The total amount of petitioner's claim passed upon by the War Department is $27,117.25. That on June 7, 1920, the said Claims Board, Transportation Service, rendered a decision in which are certain findings of fact and the following conclusions:

"The board concludes:

Jurisdiction.—That the Claims Board, Transportation Service, has jurisdiction of this claim.

Failure of Proof.—That claimants have failed to present sufficient evidence to establish any agreement either express or implied, obligating the United States to pay to claimants, or to either of them, the amount of this claim, or any portion thereof, or any other or different sum whatever.

Recommendation.—The board recommended that this claim, and each and every item thereof, be disallowed.

CLAIMS BOARD TRANSPORTATION SERVICE."

That on June 17, 1920, your petitioner appealed to the Appeal Section, War Department Claims Board, for relief and under date of July 21, 1920, the said Appeal Section in its decision refused to grant relief or allow your petitioner's claim or any part
6 thereof. That on August 9, 1920, your petitioner appealed from the decision of the Appeal Section, War Department Claims Board, to the Secretary of War, and under date of October 29, 1920, the Secretary of War denied the said claim in its decision as follows:

October 29, 1920.

Board of Contract Adjustment.

Case No. 150-C-2832.

In the Matter of the Claim of BALTIMORE & OHIO RAILROAD.

On Appeal Before the Secretary of War.

Upon consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation of the special advisers.

(Signed) NEWTON D. BAKER,
Secretary of War.

Claim of BALTIMORE & OHIO RAILROAD.

Appeal to Secretary of War from War Department Claims Board, Appeal Section.

Memorandum.

The facts are fully set forth in the opinion, and the argument of claimant, annexed thereto.

The questions presented are similar to those arising in Pennsylvania Railroad case No. 2984.

7 We recommend that the decision of the board be affirmed.

Oct. 11, 1920.

(Signed) E. HENRY LACOMBE,
R. C. GOODALE,
Special Advisers."

5. Petitioner contends most vigorously that the aforesaid decision of the Secretary of War is erroneous and unjust, as it was not and is not obligated to provide barracks for soldiers of the United States, as that is an obligation the United States cannot deny or shirk, as the duty devolves upon it to furnish barracks or quarters for its troops. Your petitioner, in its desire to co-operate in every way with the United States during the emergency that existed at Locust Point, Maryland, at the time hereinbefore mentioned, constructed the barracks and facilities heretofore set forth and paid for them and is justly entitled to reimbursement for the full amount of the expenditure made in providing suitable quarters for the troops.

6. That no action upon your petitioner's foregoing claim has been had before Congress. That said claim was presented to the Secretary of War, and that the total amount of said claim, $27,117.25, was disallowed by the Secretary of War, and your petitioner protested the disallowance of the said amount to the Secretary of War under date of August 9, 1920, but to no avail, and said Secretary of War

adheres to his said action of rejection. That no transfer or assignment of said claim or any part thereof or interest therein has been made. That said claim is now owned by your claimant, and no other person or corporation is the owner thereof or is in-
8 terested therein, and that your petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credit and set-offs; that your claimant has at all times borne true allegiance to the United States, and has not in any way voluntarily abetted or given encouragement to rebellion against said Government.

Prayers.

Wherefore your claimant prays:

1. That the court will render a judgment against the United States in favor of your claimant for payment by the United States to your claimant of the said sum of twenty-seven thousand one hundred and seventeen dollars and twenty-five cents ($27,117.25).

2. That your claimant may have such other and further relief as the nature of the case may require and to the court may seem meet and proper.

BALTIMORE AND OHIO RAILROAD COMPANY,
By W. D. OWENS,
Assistant Comptroller.

JOHN F. McCARRON,
Attorney of Record.
GEORGE E. HAMILTON,
Of Counsel.

9 & 10 STATE OF MARYLAND,
City of Baltimore, to wit:

W. D. Owens, being duly sworn, says he is Assistant Comptroller for the Baltimore & Ohio Railroad Company; that he has authority to subscribe to and verify the foregoing petition from said company; that he has read said petition, knows the contents thereof and the facts therein stated, and that he believes the same to be true.

GEO. W. HAULENBEEK,
Notary Public, State of Maryland.

My commission expires May 1, 1922.

STATE OF MARYLAND,
City of Baltimore, to wit:

J. J. Ekin, being first duly sworn, says he is Comptroller of the Baltimore & Ohio Railroad Company; that W. D. Owens, Assistant Comptroller, who has subscribed to and verified the petition of said company hereto, is authorized to do so.

J. J. EKIN.

Subscribed and sworn to before me this 1st day of February, A. D. 1921.

GEO. W. HAULENBEEK,
Notary Public, State of Maryland.

My commission expires May 1, 1922.

11 EXHIBIT No. 1.

United States Government—War Department—to the Baltimore and Ohio Railroad Company, Dr.,

For labor and material furnished in connection with construction and maintenance of barracks adjacent to Pier No. 6, Locust Point, Baltimore, Maryland, for housing the armed guard of the U. S. Quartermaster Corps used in patrol-ing the water-front and protecting government property in that vicinity.

Material:

Paint, No. 7, Black	50 gal.	@	$1.10	$55.00
Paint, Mixed Body	55 gal.	@	1.25	66.75
Paint, Standard Brown	10 gal.	@	1.25	12.50
Dryer	22 gal.	@	.70	15.40
Dryer, Yellow Ochre	5 lbs.	@	.20	1.00
Oil, Raw	50 gal.	@	1.14	57.00
Oil, Linseed	9 gal.	@	1.14	10.26
Glass, 12" x 35"	2 pcs.	@	.30	.60
Glass, 12" x 18"	6 pcs.	@	.15	.90
Glass, Wire, 23½" x 56"	1 pc.	@	1.75	1.75
Lead, White	100 lbs.	@	.0975	9.75
Turpentine	10 gal.	@	.425	4.25
Iron, Galv. Sheet, No. 27	31 sheets	@	1.40	43.40
Iron, Black Sheet, No. 24	9 sheets	@	1.40	12.60
Nails, Tinners'	18 lbs.	@	.04	.72
Nails, 10 D	10 kegs	@	4.00	40.00
Nails, 8 D	5 kegs	@	4.00	20.00
Tacks	40 lbs.	@	.10	4.00
Rivets	1 gross	@	.30	.30
Cord, No. 6, Sash	6 lbs.	@	.045	.27
Solder	4 lbs.	@	.36	1.44
Range, Steel, with boiler	1	@	350.00	350.00
Window Frames and Lights (lump sum)				239.00
Bunks, Romlich	25	@	6.50	162.50
Paper, Building	15,000 sq. ft.			83.25
Roofing, Composition	120 sqs.			510.45
Rim Locks, 6"	24	@	.93	22.32
"T" Hinges & Screws	24 pr.	@	.20	4.80
Carried Forward				$1,732.21

12

Brought Forward					$1,732.21
Materials:					
Pine, N. C., 1" x 12"–14'	280' B. M.	@	52.50	M	14.70
Pine, N. C., 1" x 12"–16'	15,336' B. M.	@	52.50	M	805.14
Pine, N. C., 1" x 8"–16'	5,263' B. M.	@	45.00	M	236.84
Pine, N. C., 2" x 4"–10'	440' B. M.	@	47.50	M	20.90
Pine, N. C., 2" x 4"–16'	6,536' B. M.	@	47.50	M	310.46
Pine, N. C., 2" x 6"–12'	1,824' B. M.	@	47.50	M	86.64
Pine, N. C., 2" x 6"–14'	6,608' B. M.	@	47.50	M	313.88
Pine, N. C., 1" x 3"–10/16'	6,180' B. M.	@	45.00	M	278.10
Pine, N. C., 2" x 6"–16'	2,032' B. M.	@	47.50	M	96.52
Pine, N. C., 3" x 6"–16'	1,920' B. M.	@	47.50	M	91.20
Flooring, YP-⅞" T. & G.	41,000' B. M.	@	47.50	M	1,947.50
Cloth, Cheese	70 yds.	@	.07		4.90
Buckets, Fire	8	@	.66		5.28
Storeroom Labor					169.85
Hauling Material					72.55
Installing Electric Lights, Labor and Material					99.42
Installing Steel Range					5.60
Total Material					$6,291.69 $6,291.69
Labor, Railroad Forces:					
December, 1917					$3,322.94
January, 1918					720.32
February, 1918					31.40
March, 1918					373.59
April, 1918					229.21
May, 1918					360.69
June, 1918					56.85
July, 1918					35.12
August, 1918					68.67
September, 1918					226.78
October, 1918					25.13
November, 1918					12.64
February, 1919					10.90
Total Railroad Labor					$5,474.27
Labor and Material, The A. F. Fedeli Co., Contractor					8,275.12
Total, All Labor					$13,749.39 13,749.39
Total Labor and Material					$20,041.08
15% Supervision					3,156.17
Total					$23,197.25
Permit from Mayor and City Council					10.00
Total					$23,207.25

Estimated Cost of Restoring Shed and Tracks to original condition:

Estimated Cost to Remove the Extensions		$2,000.00	
Repairs—Roof, Framing, etc., at Ventilators and Eaves		500.00	
Carried Forward		$2,500.00	$23,207.25
13			
Brought Forward		$2,500.00	$23,207.25
Repair—Roofing		200.00	
Replace Steps		25.00	
Boarding upon side below platform		100.00	
Replace Partitions in Original South End Enclosure:			
500 feet B. M. @ $100.00 M	$50.00		
2 Doors Replaced	20.00		
		70.00	
Painting, 2,000 sq. ft. @ .05		100.00	
		$2,995.00	
Engineering and contingencies		505.00	
Total		$3,500.00	

Salvage:

25,000 B. M. Lumber @ $20.00	$500.00		
60 Windows @ 4.00	240.00		
15 Doors @ 4.00	60.00		
2,000 l. f. Heating Pipe @ .10	200.00		
Plumbing Fixtures	150.00		
		1,150.00	
Total		$2,350.00	2,350.00

Track Work:

Grading	390 c. y. @ $1.00	390.00	
Installing No. 7 Turnouts	2 @ 85.00	170.00	
Laying Track	1,000 ft. @ .40	400.00	
Ballasting Track	1,000 ft. @ .40	400.00	
		$1,360.00	
Supervision 15%		200.00	
Total		$1,560.00	1,560.00
Grand Total			$27,117.25

Work began December, 1917.
Work completed January, 1918.

(Here follows map marked page 14.)

15 II. *History of Proceedings.*

On March 2, 1921, the defendant filed a demurrer to the plaintiff's petition.

On March 21, 1921, the demurrer was argued and submitted.

On March 28, 1921, the Court entered — handed down the following order:

Order.

This case was submitted upon the defendant's demurrer to the plaintiff's petition. On consideration whereof the court, being of opinion that it should be advised as to the facts, doth hereby overrule the said demurrer without prejudice.

By THE COURT.

III. *Argument and Submission of Case.*

On February 13, 1922, this case was argued and submitted on merits by Messrs. John F. McCarron and George E. Hamilton, for plaintiff, and by Mr. Alexander H. McCormick, for defendant.

16 IV. *Findings of Fact, Conclusion of Law and Opinion of the Court by Campbell, Ch. J.*

Entered March 6, 1922.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff, the Baltimore & Ohio Railroad Company, is, and was during the transactions hereinafter described, a corporation duly incorporated under the laws of the State of Maryland, and was the owner of a system of railroads engaged in interstate commerce.

II.

About September 1, 1917, Lieut. Col. Amos W. Kimball, was ordered for duty at Baltimore, Md., to establish an expeditionary depot and to take charge of all supplies arriving at that place for transportation to New York and other ports for shipment to Europe. In working out his plans he visited Canton, a suburb of Baltimore, on the Chesapeake Bay, and succeeded in securing from the Canton Railroad Company an option on the largest pier at that place, known as Pier No. 3. He afterwards visited Mr. Willard, the president of

the Baltimore & Ohio Railroad Company, who promised to lease to the Government Pier No. 6, which was then under construction for $150,000 a year. The deal was closed about September 15, 1917, but the lease was not executed until October, 1917, after which the pier was rushed to completion. Pier No. 6 was located at Locust Point, another suburb of Baltimore on the Chesapeake Bay, across the river from Canton. The Baltimore & Ohio Railroad Company owned eight piers at Locust Point, numbered from 1 to 9, No. 7 never having been constructed. These piers and the property on and around them were guarded at that time by civilian employees of the railroad companies.

III.

On October 30, 1917, Pier No. 9 was destroyed and Pier No. 8 damaged, and much other property belonging to the Balti-
17 more & Ohio Railroad Company was destroyed by a fire supposed to be of incendiary origin. Pier No. 9 was afterwards rebuilt and completed and Pier No. 8 was repaired early in January, 1918, and both piers were leased by the Government prior to January 10, 1918.

On October 31, 1917, Col. Kimball reported the occurrence to Washington officially by telephone, and requested that a guard be sent to Locust Point immediately. Shortly afterwards, on the same day, he visited Mr. Thompson, the acting president of the Baltimore & Ohio Railroad Company, and told him of his request for a military guard and learned that Mr. Willard, the president of the company, who was at that time head of the Committee on National Defense, had already requested the Secretary of War to furnish a guard. Mr. Thompson offered to supply a wrecking train, with a kitchen, plenty of bunks for the men, and a car for the officers, as quarters for the guard.

IV.

On the night of November 3, 1917, Maj. Charles L. Lanham, of the Coast Artillery Corps, stationed at Fort Howard, and commanding the coast defense of Baltimore, received a telephone message from the commander of the Eastern Department to send at once two companies of Coast Artillery of the Maryland National Guard, which had been mustered into the United States service and was then at Fort Howard, to Baltimore, one company to Locust Point and one to Canton, and to get in touch with Col. Amos W. Kimball, quartermaster of the expeditionary depot at Baltimore, who would advise as to the details of their duties. The order was for the troops to have sufficient teniage, and it was carried. He was informed by Col. Kimball that officials of the Baltimore & Ohio Railroad Company had arranged to quarter the guard on a construction train at Locust Point. One of the companies was dispatched about midnight of the same day to Locust Point. The next day Maj. Carrol Edgar, Coast Artillery Corps, who was in command of the First Battalion of Coast Artillery of the Maryland

National Guard, was directed by Maj. Lanham to proceed with the other company to Locust Point to take command of the detachment and to advise with Col. Kimball as to the proper distribution of the troops for guarding the piers at Locust Point and Canton.

V.

The troops were quartered in the wrecking train that had been placed in Baltimore & Ohio Railroad yard at Locust Point on November 3, 1917. After a conference with Col. Kimball and Maj. Brady, executive officer of the expeditionary depot, Maj. Edgar arranged the guard, reduced by sickness and absence to 150 men, so that a part would guard the pier at Canton and a part the piers and property at Locust Point. The troops were quartered at Locust Point and the guard for Canton was sent over the river daily. The primary duty of the troops was to protect Government property and the piers leased by the Government, but generally to guard the whole water front, especially Pier No. 6, and to send patrols at various times throughout the railroad yard at Locust Point to guard
18 cars containing property that might be used by the Government, and generally to guard all the piers and all the property at that place. The company also maintained civilian guards for its own property and a fire department for all of its property, whether leased or not.

VI.

The detachment was quartered on the wrecking train until November 9, 1917, when use of the train became necessary for some railroad purpose and it was moved away by the company. The troops then moved into tents.

The weather during the fall and winter of 1917-18 was very cold and inclement. The soldiers of the guard were for the most part Baltimoreans and their parents and other relatives visited them frequently. There was some sickness among the troops. Their relatives complained to the railroad officials of the hardships the soldiers had to undergo living in tents during such cold weather. The railroad officials were anxious to make them as comfortable as possible.

There was a transfer shed and platform at Locust Point near Pier No. 6 on land belonging to the company and not leased to the Government, built by the Baltimore & Ohio Railroad Company about 30 years before, but which had not been used for several years. It was in sound condition, however. The agent of the company in charge at Locust Point was Mr. William T. Moore, who was also a member of an advisory committee, his duty being to confer with Col. Kimball on railroad matters, and Mr. Moore and Col. Kimball met often in conference on such subjects. On a number of occasions when the weather was very cold, Col. Kimball had remarked that the troops ought to have better quarters. Mr. Moore suggested fitting up the old unused transfer shed near Pier No. 6, and Col. Kimball agreed that it would be a fine thing to make the men as comfortable as pos-

sible. Nothing was said about compensation. Col. Kimball did not ask that this work be done.

Mr. Moore afterwards saw the vice president of the company, Mr. Davis, about fitting up the transfer shed for quarters, who referred him to Mr. Begien, the general manager of the Baltimore & Ohio eastern lines. He saw Mr. Begien about the matter, who, after a short talk with the chief engineer, directed Mr. Riley, the chief draftsman in the chief engineer's office, to accompany Mr. Moore to Locust Point to look over the adaptability of the transfer shed for barracks. They visited the place together, and the next day Mr. Riley visited the shed again and took some measurments, made some pencil sketches, and afterwards got up blue-print plans for remodeling the shed for barracks. The plans provided for inclosing the north end and the east side of the shed and placing an extension on the west side with a lean-to roof, which more than doubled the capacity of the original shed, and a room for the officers to be built on the south end of the shed and extension.

The building was partitioned off into a mess hall, kitchen, guard room, sleeping room with bunks for the men, and officers' room, and suitable windows and doors were placed. The building was fitted with lights, steam heat, and water, seven toilets, nine basins, four shower baths, and a wash trough.

19 The blue print of the plans for changing the transfer shed into temporary barracks was shown to Maj. Edgar to learn from him whether or not the plans, in his opinion, would satisfactorily house the troops. He did not undertake to approve the plans, but did, however, suggest to Mr. Riley, who brought the plans to him, the amount of the facilities that would be required. This was about December 1, 1917. Nothing was said to Maj. Edgar about expense or compensation for the work.

VII.

The construction of barracks out of the old transfer shed began in the early part of December, 1917, and was completed on or about December 22, 1917, on which date the first company of the guard moved in, and on December 26, 1917, the second company moved in. The troops occupied this building until May, 1919. The piers were returned to the company in June, 1919.

No Government officials connected with the work at Locust Point in 1917 had any authority to order the construction of the temporary barracks in question, and no orders were given by them, or any of them, for the construction of such building. The subject of compensation was not mentioned in any conversations between Army officers and railroad officials until over a week after the building had been completed, when Mr. Moore told Maj. Edgar that he thought the Government ought to reimburse him for some of his trouble in the matter.

VIII.

On January 10, 1918, Col. Kimball addressed a request to the Quartermaster General for four additional companies of 105 men each to protect the vast amount of Government property stored on the piers and in the warehouses at Locust Point and Canton and en route to that port, and for immediate authority to construct two barrack buildings with proper facilities to accommodate three companies of 105 men each, one at Locust Point and one at Canton, of the type recently constructed at the various cantonments.

On February 4, 1918, the first indorsement on said request by the Acting Quartermaster General, addressed to The Adjutant General, requested authority for the construction of said barracks if the additional guard should be furnished.

On February 8, 1918, the third indorsement on said request was made by The Adjutant General advising that the request for guards should be made to the commanding general of the Eastern Department, and stating that "It is not the policy of the War Department to build a set of barracks for each and every guard. Companies will be quartered in tents where buildings are not available."

IX.

After the barracks made from the old transfer shed were evacuated by the two companies of Coast Artillery, the bunks, toilets, and plumbing were removed, and later part of the building was used by the Dominick, Scandinavian, and Oriole lines of steamships for different purposes, and the collector of internal revenue was also allowed to establish a branch office in the building, without paying rent. The building is still standing and partly occupied.

The Canton Railroad Company at a cost of about $5,000 provided comfortable accommodations for the guard sent over daily from Locust Point to protect Government and railroad property at Canton and has present no claim therefor.

X.

The plaintiff, on June 27, 1919, presented its first claim for construction of the temporary barracks at Locust Point to the War Department, under the provisions of the act of March 2, 1919, 40 Stat., 1272, commonly known as the "Dent Act," for $44,678.98. It was amended on March 11, 1920, by reducing the amount claimed to $27,117.25.

The heading of the account rendered reads: "United States Government—War Department to The Baltimore and Ohio Railroad—Federal Administration, Drs. (as their interests may appear), for labor and material furnished in connection with construction and maintenance of barracks adjacent to Pier No. 6, Locust Point, Baltimore, Maryland, for housing the armed guard of the U. S. Quarter-

master Corps, used in patrolling the water front and protecting Government property in that vicinity."

Part of the heading of the account quoted above has been omitted from the account attached to plaintiff's petition as Exhibit No. 1; the balance of the account is the same as that presented to the board, and is made part of this finding by reference thereto.

The plaintiff has submitted no evidence to the court to establish the different items of the claim for constructing or restoring the temporary barracks.

On June 7, 1920, the War Department Claims Board, Transportation Service, rendered its decision, which consisted of findings of fact and the following conclusion:

"Jurisdiction.—That the Claims Board, Transportation Service, has jurisdiction of this claim.

"Failure of proof.—That claimants have failed to present sufficient evidence to establish any agreement, either express or implied, obligating the United States to pay to claimants, or to either of them, the amount of this claim, or any portion thereof, or any other or different sum whatever.

"Recommendation.—The board recommends that this claim, and each and every item thereof, be disallowed."

On June 17, 1920, the plaintiff appealed to the appeal section of the War Department Claims Board, which, on July 21, 1920, affirmed the decision of the Claims Board.

On August 9, 1920, the plaintiff appealed to the Secretary of War, who, on October 29, 1920, rendered the following decision:

"Upon consideration of the record in the matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation of the special advisers."

21 Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The plaintiff, Baltimore & Ohio Railroad Company, sues for a large sum alleged to have been laid out and expended in the construction of barracks for United States troops at Locust Point, Md.

The claim was first presented to the War Department Claims Board under what is known as the Dent Act (40 Stat., 1272) in the names of two parties, "as their interests may appear," but it comes to this

court upon the petition of the railroad company alone. The board held that no contract, express or implied, was shown by the proof; this ruling was sustained by the appeal section of the board, and upon appeal taken to the Secretary of War the decision was affirmed. The only evidence adduced is that which was before the board, it having been brought into this record by stipulation of the parties.

The Dent Act empowered the Secretary of War to "adjust, pay, or discharge any agreement, express or implied, * * * entered into in good faith, * * * by any officer or agent, acting under his authority, direction, or instruction, or that of the President, with any person * * * for equipment or supplies or for service or for facilities, or other purposes connected with the prosecution of the war when such agreement has been performed, in whole or in part, or expenditures have been made * * * upon faith of the same by any such persons * * * , and such agreement has not been executed in the manner prescribed by law." The act contains several provisos not material here. By its terms it deals with agreements, express or implied, which so far as affects the Government shall have been entered into by a duly authorized officer or agent, and referring to agreements, express or implied, "entered into in good faith," between authorized persons, there should appear the essential element of "a meeting of the minds." Lord & Hewlett Case, 217 U. S. 340 (43 C. Cls. 282). It is, of course, necessary that the claim itself be established by proof. The plaintiff does not claim under an express contract, but alleged that an implied agreement arose out of certain negotiations in December, 1917, between its own agent, Mr. Moore, and Col. Kimball, who is alleged to have been "an officer or agent acting under the authority, direction, or instruction of the Secretary of War" for the conversion of a transfer shed belonging to plaintiff into barracks and equipping the same for the accommodation of troops of the United States, and the building of an additional structure for the accommodation of officers. The amount claimed is $27,117.25.

22 The railroad company had leased a pier to the Government at Locust Point for $150,000 per annum, and owned a number of piers there in addition, some six or eight. Vast stores were assembled in and about these piers. On the night of October 30, 1917, a fire, supposed to have been of incendiary origin, destroyed one of the company's piers and greatly damaged another. Lieut. Col. Kimball, Quartermaster Corps, in charge of expeditionary depot at Baltimore, communicated the fact the next morning to the War Department and requested that troops be dispatched immediately to guard the Government's property at Locust Point. He told the acting president of the company of this request, and learned from him that Mr. Willard, president of the company, who was head of the Committee of National Defense, had made a similar request of the Secretary of War. Mr. Thompson, in that conversation, offered the use of a train in the yards at Locust Point which he said was suitable for housing the troops. Two companies of troops from Camp Howard were ordered to Locust Point. They were part of the Maryland National Guard that had been mustered into service and were com-

posed largely, if not entirely, of men whose local residences were at Baltimore. The order directed that tentage be carried with the troops, and it was carried. When the companies arrived at Locust Point, one on November 3 and the other November 4, they were quartered in the cars of the wrecking train of which Mr. Thompson had spoken to Col. Kimball, and remained there until November 9, when the train was moved away and the troops went into the tents. These troops were intended to guard property at Locust Point as well as at Canton across the river, and they protected the property of the Government and the railroad company as well. The weather was very cold and severe during the winter of 1917. Some of the soldiers became sick, their relatives and friends complained repeatedly to officials of the company of the hardships the troops had to undergo in tents, and the want of accommodations. The troops had been in tents several weeks before the alleged negotiations between Mr. Moore and Col. Kimball, and it was during the period of the complaints above mentioned that the agreement is alleged to have been made. Mr. Moore suggested that a transfer shed belonging to the company could be converted into barracks. Col. Kimball approved the suggestion, but Mr. Moore was not authorized by the company to make the necessary alterations, nor was Col. Kimball authorized to incur the expense on the part of the Government. Mr. Moore took up the matter with his superiors, and they issued the necessary orders to convert the shed into living quarters and it was done. The shed was on the company's land and its property. At no time was there a statement or suggestion that the expense of the structure was to be charged against the Government. What the cost would be was not submitted to Col. Kimball. He positively denies that he incurred or authorized the expense. He was not authorized, instructed, or directed by the Secretary of War to construct temporary barracks. The War Department was not communicated with on the subject. The statutes have regulated the expenditures for permanent barracks and buildings. See Rev. Stat., sec. 1136; act February 27, 1877, 19 Stat., 242; act February 27, 1893, 27 Stat., 484; act June 25, 1910, 36 Stat., 721. The Army appropriation act of May 12, 1917, 40 Stat., 74, contains a provision that "hereafter no expenditure exceeding $5,000 shall be made upon any building or military post or grounds, about the same, without the approval of the Secretary of War, upon detailed estimates submitted to him." And if it may be said that these statutes do not in terms affect a structure such as that in question here, they at least indicate the policy that authority for expenditures shall be vested in a responsible head, who, generally speaking, is the Secretary of War. Assuming, however, there may be cases of exigency when an officer, to properly care for the troops under his command, may incur unusual, or at the time unauthorized expenses, that can not be the case where there is plenty of time before incurring the expense to ask for and to receive the necessary authority. At all times of the day communication between Baltimore and Washington was open; the troops remained in tents from November 9 to December 22; the president of the rail-

road company was at the head of one of the most important war boards, and could readily have conferred with the War Department.

In these circumstances there was no reason why authority to incur the unusual expenditure should not have been sought at Washington; there was no present exigency justifying the building of barracks without first definitely ascertaining the question of liability or seeking instructions with regard to it. The limited authority of an officer is a matter that all persons dealing with him must take notice of, and there is nothing in the occurrences that took place in this case that relieved the plaintiff from the duty to act advisedly in making outlays if it expected the Government to make reimbursement therefor. The evidence falls short of showing an agreement that would bind the Government to pay for altering or improving and adding to a structure on the company's land that remained the company's property after the alterations were made, and yet remains its property, even though it was used for a period to house United States troops. The duties of these troops involved in part the guarding of the company's valuable properties.

The foregoing considerations are sufficient to dispose of the case, but there is an implication in plaintiff's brief that tends to an erroneous conclusion on the question of proof. The implication is that because the Government does not "disapprove" the claim the plaintiff is entitled to judgment. It would seem from the record before the Claims Board that the matter of proof as to the amount, or items of the claim itself, was passed over pending a determination of legal liability. The general traverse puts in issue all material elements in a plaintiff's case in this court, and such a practice as that suggested before the board does not obtain here.

The petition should be dismissed, and it is so ordered.

Graham, judge; Hay, judge; Downey, judge; and Booth, judge, concur.

24 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Sixth day of March, A. D., 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed; and it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of One Hundred and fifty-four dollars and seventy-nine cents ($154.79), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Plaintiff's Application for and Allowance of an Appeal.*

Now comes the Baltimore & Ohio Railroad Company by its attorneys, George E. Hamilton, of Counsel and John F. McCarron, Attorney of Record, and appeals to the Supreme Court of the United States from the decision of this honorable court rendered in this cause in favor of the United States on March 6, 1922.

Very respectfully,

GEORGE E. HAMILTON,
Of Counsel.
JOHN F. McCARRON,
Attorney of Record.

Filed Mch. 13, 1922.

Ordered: That the above appeal be allowed as prayed for. March 13, 1922.

By THE COURT.

25 Court of Claims.

No. 39-A.

BALTIMORE AND OHIO RAILROAD COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the Court by Campbell, Ch. J.; of the judgment of the court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fourteenth day of March, A. D., 1922.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,768. Court of Claims. Term No. 813. Baltimore and Ohio Railroad Company, appellant, vs. The United States. Filed March 15th, 1922. File No. 28,768.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922, No. 326.

(Was No. 818, October Term, 1920.)

BALTIMORE AND OHIO RAILROAD COMPANY,
Appellant,
vs.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

GEORGE E. HAMILTON,
JOHN P. MacARON,
Attorneys for Appellant.

(28,768)

INDEX.

Decisions Cited.

Statutes and Reports Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922, No. 305.

(Was No. 813, October Term, 1921.)

BALTIMORE AND OHIO RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT.

The cause herein comes to this court on appeal from the Court of Claims.

Appellant, prior to November 12, 1918, and during the month of December, 1917, entered into an informal or implied agreement with the United States on account of negotiations between Lieuten-

ant-Colonel Amos W. Kimball, an officer or agent acting under the authority, direction, or instruction of the Secretary of War of the United States and W. T. Moore, of Locust Point, Baltimore, Maryland, an agent of your appellant for the conversion of the transfer shed of appellant adjacent to Baltimore and Ohio Railroad Company, Pier 6, at Locust Point, Baltimore, Maryland, to a barracks and the installation of necessary plumbing and certain other facilities therein for the accommodation of soldiers of the United States Army, and the building of an additional barrack building 25′ 4″ x 53′ 6″ to the east of said transfer shed equipped with plumbing and other facilities for the accommodation of officers of the said United States Army. The said buildings and facilities were constructed by appellant to meet the urgent needs of the War Department at the request of Lieutenant-Colonel Amos W. Kimball, Expeditionary Quartermaster of the said War Department at Locust Point, Baltimore, Maryland, for quartering soldiers of the United States as such quarters were urgently needed for them on account of the extreme weather conditions and unsuitable quarters then existing, and no written agreement was executed between the United States and appellant for the construction of the said buildings and facilities in the manner prescribed by law. The total amount due appellant for said construction and facilities is $27,117.25, in which amount is included the sum expended for labor

and material as well as the estimated cost, less salvage, of restoring the several buildings and property to their original condition. The facilities and buildings constructed by appellant were solely for the needs of the War Department in quartering troops and are of no value to it for railroad purposes and no part of such expenditure or said construction would have been made but for the aforesaid agreement in the normal development of appellant's property.

Appellant, under date of June 27, 1919, presented its claim to the War Department in the amount of $44,678.98, under the provisions of the Act of March 2, 1919, 40th Statute L., 1272, and, subsequently, under date of March 11, 1920, it amended its claim and reduced the amount to $27,-117.25. Under date of May 18 and 19, 1920, a hearing was held on said claim before the Claims Board, Transportation Service, War Department, and under date of June 7, 1920, the said Claims Board, Transportation Service, War Department, rendered its decision denying relief to appellant on the ground that the appellant had failed to present sufficient evidence to establish any agreement, either express or implied, obligating the United States to pay appellant the amount of its claim. On June 17, 1920, appellant appealed to the Appeal Section, War Department, for relief and under date of July 21, 1920, the said Appeal Section refused to grant relief and on August 9, 1920, appellant appealed to the Secretary of War

and under date of October 29, 1920, that official denied relief to your appellant.

Under date of February 9, 1921, appellant filed its petition in the Court of Claims for the recovery of the amount of its said claim rejected by the Secretary of War, and on March 2, 1921, the United States filed a demurrer to appellant's petition. The demurrer was argued and submitted under date of March 21, 1921, and on March 28, 1921, the Court of Claims entered its order overruling the demurrer filed by the United States.

Appellant and appellee by stipulation placed before the Court of Claims the evidence adduced before the Claims Board, Transportation Service, of the War Department, and upon said evidence the case was heard on the merits by the Court of Claims. On February 13, 1922, the case was argued and submitted upon the merits and under date of March 6, 1922, the Court of Claims handed down Findings of Fact and written opinion dismissing the petition of appellant.

SPECIFICATION OF ERRORS.

I. The Court of Claims erred in dismissing appellant's petition as the findings of fact show an implied agreement under the Dent Act, 40th Statute, L. 1272.

II. The primary duty of the United States troops was to guard Government property at Locust Point, Baltimore, Maryland, and therefore,

the barracks were indispensable to the soldiers of the United States and the Court of Claims erred in not holding the United States is obligated to pay appellant for same.

III. Appellant was not obligated to build barracks free of charge for soldiers of the United States which were taken over and occupied by them from December, 1917, to May, 1919, and the Court of Claims erred in refusing to hold the United States liable for the amount of this claim.

IV. The Court of Claims erred in refusing to render its judgment that appellant under the implied agreement is entitled to the full amount of its claim amounting to $27,117.25.

V. What the Canton Railroad did has no relation whatsoever to this claim and therefore, the findings in regard to said railroad are clearly error.

ARGUMENT.

POINT 1.

COURT OF CLAIMS ERRED IN DISMISSING PETITION.

We respectfully submit that the Court of Claims erred in dismissing the petition in this cause and holding that, "The evidence falls short of showing an agreement that would bind the Government" (Rec., 17) to pay for the construction in question. And yet the court in its decision fails to fully con-

sider its findings of fact in reaching such a conclusion as heretofore stated. Its construction of the Dent Act, we most respectfully submit, cannot be confined to the narrow margin as set forth in the decision. The act deserves and should receive a most liberal construction for its very title indicates such a construction. It is "An act to provide relief in cases of contracts connected with the prosecution of the war and for other purposes." In the letter of the War Department to Congress requesting the legislation this is emphasized as here set forth in part:

> "Yielding to the exigencies of the war situation, such contractors put the work of production ahead of the work of negotiation, and have often put themselves in a position where their only reliance was the good faith and fairness of the Government, in finally fixing the terms of the agreement. For example, in the manufacture of a certain important type of gun it was thought impracticable to determine the proper price basis at the time the order for the production of the gun was given, as there was insufficient experience as to what the cost of manufacture would be and the determination of the price, and so the final execution of the formal contract was left until there would be sufficient actual manufacturing experience for the Government to make a proper determination as to price. Further, there are a number of instances where the Government, in execution of its plans for the erection of a munition plant or the creation of a canton-

ment, induced the occupants of land to vacate it and go to considerable expense without any agreement as to compensation for the purchase or use of the land having been actually reached. With the armistice the plans of the Government have been so charged that the Government cannot properly now proceed with the purchase of the land in question, and there is nothing between the Government and the persons who have vacated their land but a vague, implied agreement to compensate them. * * *

"Nor should the patriotism be penalized of those who in the exigencies of the war have gone ahead to produce instead of waiting to bargain. It is true that such persons have nothing to rely on except the good faith of the United States, but surely there should be no more solid ground for reliance than that good faith."

(House Report No. 877, 65th Congress, 3rd Session.)

The Court of Claims said in its decision:

"By its terms it deals with agreements, express or implied, which so far as affects the Government shall have been entered into by a duly authorized officer or agent, and referring to agreements, express or implied, 'entered into in good faith,' between authorized persons, there should appear the essential element of 'a meeting of the minds.'"

(Rec., p. 15.)

It will be observed that the Court of Claims states in part:

> "between authorized persons, there should appear the essential element of 'a meeting of the minds.'"
>
> (Rec., p. 15.)

but it does not state how this "meeting of the minds" should appear. It has been laid down that minds may meet in several ways in implied contracts but the Court of Claims in its decision deals with "a meeting of the minds" in general terms and is not specific in its application of the phrase. For, as has been said:

> "In implied contracts the parties have capacity to contract; facts, circumstances, few or many, clear or complicated, exist, which lead the minds of the jurors to the conclusion that the minds of the parties met. Minds may meet by words, acts, or both. The words even may negative such meeting, but 'acts which speak louder than words' may conclude him who denies a tacit contract.' Sceva *v.* True, 53 N. H., 627, 629."
>
> (13 Corpus Juris, p. 242.)

And the Court of Claims in a leading case said:

> "Implied contracts in fact do not arise from the denials and contentions of parties, but from their common understanding in the ordinary course of business, whereby mutual intent to contract without formal words therefore is shown. (Hertzog *v.* Hertzog, 29 Pa. St., 465, and authorities there cited; Harley *v.* United States, *supra.*)"
>
> (Knapp *v.* United States, 46 Ct. Cl., 643.)

This court has said:

> "Of implied contracts there are two kinds, first, where a man takes property and the owner waives the tort and sues in assumpsit—*i. e.*, where there is no meeting of minds; second, where the parties meet, and their meeting results in an unexpressed agreement."
>
> (Harley *v.* United States, 39 Ct. Cl. 105 and 198 U. S., 229.)

In Knote *v.* United States, in 95 U. S., at page 149, in defining the jurisdiction of the Court of Claims and what constitutes an implied contract, this court said:

> "The jurisdiction of that court is limited to claims founded upon a law of Congress, or upon a regulation of an Executive Department, or upon a contract, express or implied, with the Government. The claim here presented rests upon a supposed implied contract to pay to the claimant the money received as the proceeds of the forfeited property. *To constitute such a contract, there must have been some consideration moving to the United States; or they must have received the money, charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was reserved as in the case of money paid by mistake.*" (Italics ours.)

It has also been held:

> "An implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter of reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary, assumption that a contract existed between them by tacit understanding. Miller's Appeal, 100 Pa., 568; 45 Am. Rep., 394; Wickham *v.* Weil (Com. Pl.), 17 N. Y. Supp., 518; Hinkle *v.* Sage, 67 Ohio St., 256; 65 N. E., 999; Power Co. *v.* Montgomery, 114 Ala., 433; 21 South., 960; Railway Co. *v.* Gaffney, 65 Ohio St., 104; 61 N. E., 152; Jennings *v.* Bank, 79 Cal., 323; 21 Pac., 852; 5 L. R. A., 233; 12 Am. St. Rep., 145; Deane *v.* Hodge, 35 Minn., 146; 27 N. W., 917; 59 Amm. Rep., 321; Bixby *v.* Moore, 51 N. H., 403."

The Lord and Hewlett case, 217 U. S., 340 (43 Ct. Cls., 282) (Rec., 15), cited by the Court of Claims, we respectfully submit has no application to the instant case. The Lord and Hewlett case did not arise during war time, was not a claim growing out of war time condition, did not involve the constructing of barracks for soldiers, and the taking over of same by the War Department. On the other hand the Lord and Hewlett case dealt with the question as to whether there was a contract of employment between Lord and Hewlett and the Secretary of Agriculture for the employment of Lord and Hewlett as architects of a public building to be

erected by the United States for the use of the Department of Agriculture and because no agreement was ever executed between the claimant and the United States, this court held:

> "the minds of the parties never met as to the terms of any contract in execution of the provisions of the act of February 9th, 1903."

Again in its decision the Court of Claims has sought to further narrow the construction of the Dent Act, for it states:

> "The statutes have regulated the expenditures for permanent barracks and buildings. See Rev. Stat., sec. 1136; Act February 27, 1877, 19 Stat., 242; Act February 27, 1893, 27 Stat., 484; Act June 25, 1910, 36 Stat., 721. The Army Appropriation Act of May 12, 1917, 40 Stat., 74, contains a provision that 'hereafter no expenditure exceeding $5,000.00 shall be made upon any building or military post or grounds, about the same, without the approval of the Secretary of War, upon detailed estimates submitted to him.' And if it may be said that these statutes do not in terms affect a structure such as that in question here, they at least indicate the policy that authority for expenditures shall be vested in a responsible head, who, generally speaking, is the Secretary of War."
>
> (Rec., p. 16.)

And again:

> "The limited authority of an officer is a matter that all persons dealing with him must take notice of, and there is nothing in the occurrences that took place in this case that relieved the plaintiff from the duty to act advisedly in making outlays if it expected the Government to make reimbursement therefor."
>
> (Rec., p. 17.)

We again most respectfully dissent from the above excerpts of the Court of Claims' decision and say most earnestly that while the statutes may indicate a policy of the Government in reposing authority for expenditures in a responsible head such as the Secretary of War, yet the Dent Act makes no such limitations for it distinctly states:

> "That the Secretary of War be, and he is hereby authorized to adjust, pay, or discharge any agreement express or implied, upon a fair and equitable basis that has been entered into in good faith during the present *emergency* and prior to November twelfth, nineteen hundred and eighteen *by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation*, for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition, or control of equipment, materials, or supplies, or for services,

> or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law." (Italics ours.)
>
> (Section 1, 40th Statute L., 1272.)

As to the limited authority of an officer and notice to be taken of it as well as the plaintiff acting advisedly in making outlays if it is expected the Government is to make reimbursement therefor, as expressed by the Court of Claims in this case being all outside the purview of the Dent Act. It is submitted that appellant in the days of war could ill afford to question the authority of an officer of the rank of Lt. Col. Amos W. Kimball, in view of the responsible assignment held by him, nor could it in those days of stress and emergency, stop to bargain when an imperative situation confronted the Government in providing a temporary barracks for soldiers of the United States who were absolutely needed to guard and protect the property of the United States, as the Court of Claims found that:

> "The primary duty of the troops was to protect Government property and the piers leased by the Government, but generally to guard the whole water front, especially Pier

> No. 6, and to send patrols at various times throughout the railroad yard at Locust Point to guard cars containing property that might be used by the Government, and generally to guard all the piers and all the property at that place."
>
> (Rec., p. 11.)

The decision of the Court of Claims is erroneous, as is clearly shown by its Findings of Fact and the narrow construction it applies to the Dent Act.

POINT II.

IMPLIED AGREEMENT UNDER THE DENT ACT.

In pointing out the implied agreement between appellant and appellee, it is necessary for appellant to confine itself to the Findings of Fact made by the Court of Claims, for in the case of William F. Brothers *v.* United States, this court said:

> "For the purposes of our review the findings of that court are to be treated like the verdict of a jury, and we are not at liberty to refer to the evidence, any more than to the opinion, for the purposes of eking out, controlling, or modifying their scope. United States *v.* Smith 94 U. S., 214, 218; 24 L. Ed., 115; Stone *v.* United States, 164 U. S., 380, 382; 41 L. Ed., 477, 478; 17 Sup. Ct. Rep., 71; District of Columbia *v.* Barnes, 197 U. S., 146, 150; 49 L. Ed., 699, 700; 25

Sup. Ct. Rep., 401; Crocker *v.* United States, 240 U. S., 74, 78; 60 L. Ed., 533, 536; 36 Sup. Ct. Rep., 245, and cases cited."
(250 U. S., 88.)

Before taking up those findings of the Court of Claims which show the existence of an implied agreement under the Dent Act, we respectfully call to the attention of the court the situation of the parties before the making of the implied agreement. In Finding 2 the Court of Claims has found:

> "About September 1, 1917, Lieut. Col. Amos W. Kimball, was ordered for duty at Baltimore, Md., to establish an expeditionary depot and to take charge of all supplies arriving at that place for transportation to New York and other ports for shipment to Europe. In working out his plans he visited Canton, a suburb of Baltimore, on the Chesapeake Bay, and succeeded in securing from the Canton Railroad Company an option on the largest pier at that place, known as Pier No. 3. He afterwards visited Mr. Willard, the President of the Baltimore & Ohio Railroad Company, who promised to lease to the Government Pier No. 6, which was then under construction for $150,000 a year. The deal was closed about September 15, 1917, but the lease was not executed until October, 1917, after which the pier was rushed to completion. Pier No. 6 was located at Locust Point, another suburb of Baltimore, on the Chesapeake Bay, across the river from Canton. The

> Baltimore & Ohio Railroad Company owned eight piers at Locust Point, numbered from 1 to 9, No. 7 never having been constructed. These piers and the property on and around them were guarded at that time by civilian employees of the railroad companies" (Rec., pp. 9-10).

It will be noted that the court does not find that appellant had anything to do with Lieutenant-Colonel Kimball's coming to Baltimore but that he was ordered there "to establish an expeditionary depot and to take charge of all supplies arriving at that place for transportation to New York and other ports for shipment to Europe" (Rec., p. 9). It will be observed that this was quite an undertaking, and as early as October, 1917, the United States closed a deal for the leasing of appellant's Pier No. 6, at Locust Point (Rec., p. 10). Appellant had 8 piers at Locust Point and all were guarded at that time by civilian employees of appellant (Rec., p. 10). Under date of October 30, 1917, appellant's Pier No. 9 was destroyed and its Pier No. 8 damaged, and much other property belonging to appellant was destroyed by a fire supposed to be of incendiary origin (Rec., p. 10). The very next day after the fire, October 31, 1917, Colonel Kimball reported the fire to Washington by telephone and requested that a guard be sent to Locust Point immediately (Rec., p. 10). Finding 3 does not disclose why the guard was immediately desired but Finding 2 does disclose that the United

States had leased Pier No. 6 from appellant which was located at Locust Point, and said finding also shows that Piers 8 and 9 were located at Locust Point; therefore, the close proximity of Pier 6 leased by the Government to Pier No. 9 destroyed and Pier No. 8 damaged by the fire of incendiary origin (Rec., p. 10) undoubtedly gave Colonel Kimball much apprehension for he immediately asked for a guard, which we must assume was for the protection of Government property on Pier 6, as the Court of Claims found that appellant's other piers were guarded at the time by civilian employees of appellant (Rec., p. 10). Why Colonel Kimball called on Mr. Thompson after asking for the guard from the War Department is not explained (Rec., p. 10) by the finding, unless it was to request some temporary quarters for the guard. Surely an officer of the United States Army would not call upon a civilian to ask him to secure the guard in view of the rank of Lieutenant-Colonel Kimball and the important assignment given him, as shown by Finding 2. Therefore, the only correct conclusion to be drawn from Finding 3 is that Colonel Kimball called on Mr. Thompson to secure some temporary quarters for the guard he had asked to be sent to Locust Point, for when the guard was ordered to Locust Point on the night of November 3, 1917, they were not ordered to report to Mr. Thompson but to "Colonel Amos W. Kimball, quartermaster of the expeditionary depot, at Baltimore, who would advise as to the details of

their duties." Findings 5 and 6 show that the quarters furnished by appellant was a wrecking train and was merely temporary, for the troops were only on the train from November 3, 1917, to November 9, 1917 (Rec., p. 11).

PRIMARY DUTY OF TROOPS.

The Court of Claims has found why the troops were sent to Locust Point as disclosed by Finding 5, as follows:

> "The primary duty of the troops was to protect Government property and the piers leased by the Government, but generally to guard the whole water front, especially Pier No. 6, and to send patrols at various times throughout the railroad yard at Locust Point to guard cars containing property that might be used by the Government, and generally to guard all the piers and all the property at that place" (Rec., p. 11).

WEATHER CONDITIONS AT LOCUST POINT.

In Finding 6 the Court of Claims has found:

> "The weather during the fall and winter of 1917-18 was very cold and inclement. The soldiers of the guard were for the most part Baltimoreans and their parents and other relatives visited them frequently. There was some sickness among the troops" (Rec., p. 11).

It will thus be seen that the *weather conditions* and the *primary duty* for which the troops were sent to Locust Point, undoubtedly gave Colonel Kimball much concern for the Court of Claims has found:

> "On a number of occasions when the weather was very cold, Colonel Kimball had remarked that the troops ought to have better quarters. Mr. Moore suggested fitting up the old unused transfer shed near Pier No. 6, and Colonel Kimball agreed that it would be a fine thing to make the men as comfortable as possible" (Rec., pp. 11-12).

REQUEST FOR BUILDING OF BARRACKS.

We respectfully submit that the above finding of the Court of Claims shows that Colonel Kimball was the moving party in desiring barracks for the soldiers and the suggestion of Mr. Moore to fitting up the transfer shed came as a result of Colonel Kimball's remarks. He was the moving party and he was concerned in looking after the men because the Court of Claims has found that "There was some sickness among the troops" (Rec., p. 11) and "The weather during the fall and winter of 1917-18, was very cold and inclement" (Rec., p. 11).

The Court of Claims does not find that appellant was concerned with the care of the troops, for that was a matter for Lieutenant-Colonel Kimball, but the finding does show a co-operation upon the part of appellant to assist Lieutenant-Colonel Kimball.

Mr. Moore, agent of appellant, after Lieutenant-Colonel Kimball had discussed with him that the troops ought to have better quarters, did not proceed with any construction until he had first seen the superior officers of appellant and obtained authority to refit the transfer shed for the troops Even when the plans for refitting the shed were under way, Major Edgar suggested "the amount of the facilities that would be required" (Rec., p. 12). The barracks were constructed and were taken over by soldiers of the United States in December of 1917, and occupied by them until May, 1919 (Rec., p. 12). The findings do not disclose any objection by the superior officers of Lieutenant-Colonel Kimball or the Secretary of War to taking over the barracks. Neither do the findings show that Lieutenant-Colonel Kimball was ever taken to task by his superior officers for exceeding his authority in the premises, if he really did so.

We respectfully submit that the findings of the Court of Claims show an implied agreement under the Dent Act, in that the acts and language of Lieutenant-Colonel Kimball show a request for the barracks, for Webster defines a request as an 1. "Act or an instance of asking for something or some action desired; expression of desire" (page 1811, Webster's New International Dictionary) and also the act of suggesting the amount of the facilities by Major Edgar, the construction of the barracks by appellant, the taking over of the same

by the United States troops also show a consideration moving to the United States, for the facilities were connected with the prosecution of the war, and there was no gift of such facilities by appellant to the United States and said implied agreement, therefore, comes squarely under section 1 of the Dent Act.

The Court of Claims fails to point out the implication of a promise to pay upon the part of the United States as shown by the entire findings, for when the troops took over the barracks immediately that implication was very clearly shown, for the United States is bound, under the implied agreement, to pay for the said barracks. The Government is in no different position than an individual when it contracts with one of its citizens, for it has been held:

> "When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority and exchanges the character of a legislator for that of a moral agent with the same rights and obligations as an individual."
>
> (Lyons *v.* United States, 30th Ct. Cl., 352.)

And this court has said:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied

against citizens under the same circumstances will be implied against them."
(U. S. *v.* Bostwick, 94 U. S., 53.)

In Finding 7 the Court of Claims said:

"No Government officials connected with the work at Locust Point in 1917 had any authority to order the construction of the temporary barracks in question, and no orders were given by them, or any of them, for the construction of such building. The subject of compensation was not mentioned in any conversations between army officers and railroad officials until over a week after the building had been completed, when Mr. Moore told Major Edgar that he thought the Government ought to reimburse him for some of his trouble in the matter."
(Rec., p. 12.)

The above finding, so far as the authority of the Government officials at Locust Point is concerned, is hardly consistent with the attitude and acts of Lt.-Col. Kimball and Major Edgar as disclosed by Finding 6. The Dent Act is broad enough to cover both of these officials in fixing their authority for it provides "by any officer * * * acting under his authority, direction or instruction," (Sec. 1, 40th L. 1272) meaning the Secretary of War. Here were two officers of the Army looking after the welfare of the soldiers of the United States and under their command said soldiers took over and occupied these barracks built by appellant as a

result of the acts and language of the moving party Lt.-Col. Amos W. Kimball as disclosed by Finding 6. The Court of Claims in its decision states:

> "Assuming, however, there may be cases of exigency when an officer, to properly care for the troops under his command, may incur unusual, or at the time unauthorized expenses, that cannot be the case where there is plenty of time before incurring the expense to ask for and to receive the necessary authority. At all times of the day communication between Baltimore and Washington was open; the troops remained in tents from November 9 to December 22; the president of the railroad company was at the head of one of the most important war boards, and could readily have conferred with the War Department."
>
> (Rec., pp. 16-17.)

The court by its findings shows that there was an emergency at Locust Point by Findings 4, 5, and 6, so there is no need for further discussion of same. However, we wish to state that appellant's president had no reason to confer with the War Department and none is shown by the findings. This was a case of emergency in war time when every good citizen was co-operating with the Government and endeavoring to help win the war. The Dent Act was enacted subsequently to the Armistice to take care of a situation of this kind, and being a remedial statute deserves most liberal construction.

Under the said implied agreement the detailed

amount of appellant's claim (Rec., pp. 6-7-8 and 14), there is due and owing appellant the sum of twenty-seven thousand, one hundred seventeen dollars and twenty-five cents ($27,117.25) for which judgment should be rendered.

The Dent Act, as has already been shown, is for the purpose of providing relief in a situation as is disclosed by the findings in this case and the Court of Claims erred in not finding an implied agreement under said act and awarding judgment for appellant for the amount of its said claim.

POINT III.

WHAT THE CANTON RAILROAD COMPANY DID HAS NO RELATION TO THIS CLAIM.

The Court of Claims in its Finding No. 9 said:

> "The Canton Railroad Company at a cost of about $5,000 provided comfortable accommodations for the guard sent over daily from Loucust Point to protect Government and railroad property at Canton and has presented no claim therefor."
>
> (Rec., p. 13.)

We are unable to understand why the court has made such a finding, for appellant has made no claim in its petition (Rec., 1 to 8, inclusive) for the Canton Railroad Company. What that road did or did not do is of no concern in the instant claim. The Court of Claims might just as well have in-

cluded in its findings that the Pohick Railroad Company in Alaska had done the same thing as the Canton Railroad Company, if such were a fact, so far as the relevancy of the matter is concerned. We respectfully submit and earnestly insist that all findings as to what the Canton Railroad Company did are entirely beside the issues of this case and therefore totally irrelevant in determining the existence of an implied agreement between the United States and appellant.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be reversed and that judgment should be rendered in favor of appellant under the implied agreement in the amount of $27,117.25.

Very respectfully,

GEORGE E. HAMILTON,
JOHN F. MCCARRON,
Attorneys for Appellant.

(8405)

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

BALTIMORE AND OHIO RAILROAD COMPANY, appellant,
v.
THE UNITED STATES.
No 305.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing the petition upon findings of fact made after trial.

The claim was for $27,117.25, expended for labor and material in connection with remodeling an old shed owned by the claimant at Locust Point, Md., for a barracks for soldiers stationed at that place to guard property of the United States and the claimant company. The work was not requested by the Army officers, and nothing was said about compensation until after the work had been completed (p. 12). The claim was presented to the War Department Claims Board under the Dent Act, 40 Stat. 1272, which held that no contract, express or implied, ob-

36068—23

ligating the United States had been established, and the board's decision was approved by the Secretary of War (p. 14).

From the findings the following facts appear:

In September, 1917, Lieut. Col. Amos W. Kimball was ordered to Baltimore to establish an expeditionary depot. He visited Mr. Willard, president of the Baltimore & Ohio Railroad Co., and arranged a lease of Pier No. 6, at Locust Point, a suburb of Baltimore on the Chesapeake Bay. The railroad company owned eight piers at Locust Point, and these piers and the property on and around them were guarded at that time by civilian railroad employees. (Second finding, pp. 9 and 10.)

On October 30, 1917, a fire, supposed to be of incendiary origin, destroyed Pier No. 9, damaged Pier No. 8, and destroyed much other property belonging to the railroad company. Pier No. 9 was rebuilt and Pier No. 8 was repaired early in January, 1918, and both piers were leased by the Government prior to January 10, 1918. The day after the fire Colonel Kimball reported it to Washington by telephone and requested that a guard be sent to Locust Point immediately. On the same day he visited the acting president of the railroad company, told him of his request for a military guard, and learned that Mr. Willard, the president of the company, who was at that time head of the committee on national defense, had already requested the Secretary of War to furnish a guard.

Mr. Thompson, the acting president of the railroad company, offered to furnish a wrecking train, with a kitchen, plenty of bunks for the men, and a car for the officers, as quarters for the guard. (Third finding, p. 10.)

On November 3, 1917, the officer in command of the coast defense of Baltimore at Fort Howard received orders to send at once two companies of Coast Artillery of the Maryland National Guard, which had been mustered into the United States service, to Baltimore, one company to Locust Point, and one to Canton, across the river, and to get in touch with Colonel Kimball, who would advise as to their duties. The order was for the troops to have sufficient tentage, and it was carried. The troops were sent in accordance with the order. (Fourth finding, p. 10.)

The troops, numbering about 150 men, were quartered in the wrecking train that had been placed in the Baltimore & Ohio Railroad yard at Locust Point, and it was arranged that part should guard the pier at Canton and part the pier and property at Locust Point. The primary duty of the troops was to protect Government property, but generally to guard the whole water front, and the piers and all the property at that place. The company also maintained civilian guards and a fire department. (Fifth finding, p. 11.)

The troops were quartered on the wrecking train until November 9, when use of the train became

necessary for some railroad purpose, and it was moved away by the company. The troops then moved into tents. The weather during the fall and winter of 1917–18 was very cold. The soldiers were for the most part Baltimoreans, and their parents and relatives visited them frequently. There was some sickness among them, and their relatives complained to the railroad officials of the hardships that the soldiers had to undergo living in tents. The railroad officials were anxious to make them as comfortable as possible.

There was a transfer shed and platform near Pier No. 6 on land belonging to the company and not leased to the Government, built by the railroad company about 30 years before, and which had not been used for several years. It was in sound condition, however. The agent of the company in charge at Locust Point was William T. Moore, a member of an advisory committee whose duty was to confer with Colonel Kimball on railroad matters. Mr. Moore and Colonel Kimball met frequently, and on several occasions when the weather was very cold Colonel Kimball had remarked that the troops ought to have better quarters. Mr. Moore suggested fitting up the old unused transfer shed, and Colonel Kimball agreed that it would be a fine thing to make the men as comfortable as possible. Nothing was said about compensation nor did Colonel Kimball ask that this work be done. Mr. Moore afterwards saw the vice president of the company, Mr. Davis, about this matter, and Mr. Davis referred

him to Mr. Begien, general manager of the Baltimore & Ohio Eastern Lines. He saw Mr. Begien who, after talking with the chief engineer, directed Mr. Riley, the chief draftsman in the latter's office, to accompany Mr. Moore to Locust Point and look over the situation. They visited the place together, and the next day Mr. Riley took some measurements, made some pencil sketches and afterwards made blue-print plans for remodeling the sheds for barracks. The plans provided for closing the north end and east side of the shed, placing an extension on the west side with a lean-to, which more than doubled the capacity of the original shed, and a room for the officers to be built on the south end. The building was partitioned off into a mess hall, kitchen, guardroom, sleeping room with bunks for the men, and officers' rooms; and windows and doors were placed. The building was also fitted with light, heat, water, and toilet facilities. The blue print of the plans was shown to Major Edgar, to learn from him whether or not the plans, in his opinion, would satisfactorily house the troops. He did not undertake to approve the plans, but did suggest to Mr. Riley, who brought the plans to him, the amount of the facilities which would be required. Nothing was said to Major Edgar about the expense or compensation for the work. (Sixth finding, pp. 11 and 12.)

The work thus planned was begun in the early part of December, 1917, and completed on or about December 22. On that date the first company of

the guard moved in and on December 26 the second company moved in, and they continued to occupy the building until May, 1919. The piers were returned to the company in June, 1919.

No Government officials connected with the work at Locust Point in 1917 had any authority to order the construction of the temporary barracks in question, and no orders were given by them, or any of them, for the construction of such building. The subjects of compensation was not mentioned in any conversations between Army officers and railroad officials until over a week after the building had been completed, when Mr. Moore told Major Edgar that he thought the Government ought to reimburse him for some of his trouble in the matter. (Seventh finding, p. 12.)

On January 10, 1918, Colonel Kimball addressed a request to the Quartermaster General for four additional companies to protect the vast amount of Government property at Locust Point and Canton, and for immediate authority to construct two barrack buildings of the type recently constructed at the various cantonments. The matter was referred to The Adjutant General, who, on February 8, 1918, by endorsement, stated that "It is not the policy of the War Department to build a set of barracks for each and every guard. Companies will be quartered in tents where buildings are not available." (Eighth finding, p. 13.)

After the barracks made from the transfer shed were vacated, the bunks, plumbing, etc., were re-

moved, and later part of the buildings was used by steamship companies for different purposes, and the collector of internal revenue was allowed to establish a branch office in the building without rent. The building is still standing and partly occupied. The Canton Railroad Company, at a cost of about $5,000, provided comfortable accommodations for the guards sent over daily from Locust Point, and presented no claim therefor. (Ninth finding, p. 13.)

On June 27, 1919, a claim was presented to the War Department under the Dent Act for $44,678.98. This was amended on March 11, 1920, by reducing the amount claimed to $27,117.25. (Tenth finding, p. 13.) This claim was rejected by the War Department, as has been hereinbefore set forth.

ARGUMENT.

The Court of Claims found that upon these facts no contract, express or implied, had been established. The Dent Act, 40 Stat. 1272, so far as relevant, provides:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for dam-

> ages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law:" * * *

It will be observed that to recover under this act it must appear that there has been an "agreement," express or implied, entered into in good faith by an officer or agent acting under the "authority, direction, or instruction" of the Secretary of War or the President, and that expenditures have been made or obligations incurred "upon the faith of the same." The appellant does not claim any express contract, but contends that an implied agreement arose out of the negotiations between its agent, Mr. Moore, and Colonel Kimball. Colonel Kimball did not ask that the work be done. It was Mr. Moore who suggested fitting up the unused shed, and Colonel Kimball simply agreed that it would be a good thing to do. The weather was cold; some of the soldiers were sick; they came from Baltimore, near by; and their relatives visited them frequently. The sight of these soldiers just from civil life, living in tents in

cold weather, naturally was distressing to their relatives, who complained to the railroad officials, not to the officer commanding the troops. These soldiers had been quartered in a wrecking train voluntarily by the railroad company until the company required the train for other use, and thereafter they occupied tents. It is also to be remembered that, while their primary duty was to protect Government property, they were also protecting railroad property of great value. The negotiations between Mr. Moore and Colonel Kimball amounted to nothing more than a suggestion to Colonel Kimball, in one of their numerous conversations, with an expression by that officer of his agreement that "It would be a fine thing to make the men as comfortable as possible," and there was no suggestion that the Government should pay for the expense. Mr. Moore saw the vice president of the company, the vice president talked with the chief engineer, plans were drawn, and the work done. This seems to have been done wholly upon the initiative of the railroad officials, and there was nothing in the transaction to suggest that they were acting otherwise than voluntarily, inspired by the commendable motive of making comfortable the men who were guarding their property and who came from the city where the company had its principal offices. It seems to have been undertaken in the spirit of kindness and generosity, coupled with what was obviously practical expediency. There was no formal

approval of plans and specifications, no estimate of cost, and no intimation that the Government must pay. The troops were not unprovided for; the Government furnished tents, and, as stated by The Adjutant General, it was not the policy of the War Department to build barracks for each and every guard. While living in tents in cold weather seems a severity to those in civilian life, nevertheless it is not a strange thing for soldiers to do, nor is it, we think, regarded in the Army as extraordinary hardship. At any rate the alteration of the shed was not done at the request of the War Department. It is not claimed that there was any duress or commandeering of the shed, nor was there any emergency. The War Department was within easy telephonic communication with Locust Point, and no Government official at Locust Point had any authority to order the construction of temporary barracks, nor did any of them give such order. There could, therefore, have been no implied agreement entered into by any officer acting under the authority, direction, or instruction of the Secretary of War. It is not claimed that the Secretary of War, or anybody having authority to authorize such expenditures, had any knowledge of the transaction whatever. Mr. Willard, the president of the company, was in close touch with the Secretary of War, and also, undoubtedly, with the acting president and other officers of his own company, and it would have been the easiest thing in the world, had it been their intention to ask the

Government to pay for this work, to seek authority from the Secretary of War or some other official authorized to incur the expense. The War Department was not communicated with on the subject. As Chief Justice Campbell of the Court of Claims points out in his opinion, the Act of May 12, 1917, 40 Stat. 74, contains the provision:

> That hereafter no expenditure exceeding $5,000 shall be made upon any building or military post or grounds about the same without the approval of the Secretary of War, upon detailed estimates submitted to him.

And if that statute and the other statutes (Revised Statutes, section 1136; act February 27, 1877, 19 Stat. 242; act February 27, 1893, 27 Stat. 484; act June 25, 1910, 36 Stat. 721) do not in terms affect a structure such as that in question here, they at least indicate the policy that authority for expenditures shall be vested in a responsible head, who, generally speaking, was the Secretary of War. If there may be cases of emergency where an officer in order properly to care for his troops may incur unusual expense or expenses not formally authorized, it can not be the case where there is plenty of time before incurring the expense to ask for and receive the necessary authority. The limited authority of an Army officer is a matter of which all persons dealing with him must take notice, and there is nothing in the occurrences which took place in this case that relieved the appellant from the duty

of acting advisedly in making outlays if it expected the Government to make reimbursement.

Furthermore it is impossible to imagine that an officer of Colonel Kimball's rank would for a moment have done anything which he had the slightest idea would commit the Government to payment for this work without at least getting an estimate of the cost and communicating with some superior officer of the department. As Chief Justice Campbell says: "At no time was there a statement or suggestion that the expense of the structure was to be charged against the Government." The claim falls far short of satisfying the provisions of the Dent Act. Colonel Kimball did not act nor pretend to act under the authority of the Secretary of War, nor were the expenditures made upon the "faith of the same." The claim seems to have been a pure afterthought. No claim was made until after the passage of the Dent Act.

The rule with respect to implied promises to pay is well stated in the case of *La Fontaine* v. *Hayhurst*, 89 Me. 391, as follows:

> No binding promise to make compensasation can be implied or inferred in favor of one party against another, unless the one party, the party furnishing the consideration, then expected and from the language or conduct of the other party under the circumstances had reason to expect such compensation from the other party.

In *Coleman* v. *United States*, 152 U. S. 96, 99, this court said:

> But we think that a promise to pay for services can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited.

In *Railway Company* v. *Gaffney*, 65 Ohio St. 104, 116, the court said:

> The rule of evidence applicable to the proof of an implied contract is accurately stated in Abbott's Trial Evidence, 358, as follows: "In general there must be evidence that defendant requested plaintiff to render the service or assented to receiving their benefit under circumstances negativing any presumption that they would be gratuitous. The evidence usually consists in, first, an express request pertaining to the services, or second, circumstances justifying the inference that plaintiff, in rendering the services expected to be paid, and defendants supposed or had reason to suppose and ought to have supposed that he was expecting pay, and still allowed him to go on in the service without doing anything to disabuse him of this expectation; or third, proof of benefit received, not on an agreement that it was gratuitous and followed by an express promise to pay."

The circumstances of this case show that it is wholly lacking in the elements necessary to establish an implied contract.

There was no request by any Government officer that the work be done.

There was no suggestion by anyone that pay was expected.

The act of the railroad company was apparently a spontaneous act of kindly generosity, so regarded by all concerned.

In the case of *Wood* v. *Ayres*, 39 Mich. 345, 351, the court said:

> Where there is a spontaneous service as an act of kindness and no request, or where the circumstances account for the transaction on some ground *more probable* than that of a promise of recompense, no promise will be implied. The contract connection is not established.

The judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

MARCH, 1923.

○

BALTIMORE & OHIO RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 305. Argued March 12, 1923.—Decided April 9, 1923.

1. The Dent Act, c. 94, 40 Stat. 1272, was intended to remedy irregularities and informalities in the mode of entering into the agreements to which it relates; not to enlarge the authority of the agents by whom they were made. P. 596.
2. The "implied agreement" contemplated by this act is not an agreement "implied in law," or *quasi* contract, but an agreement "implied in fact," founded on a meeting of minds inferred, as a fact, from conduct of the parties in the light of surrounding circumstances. P. 597.

3. Findings of fact showing that the claimant railway company constructed temporary barracks for troops, who were guarding its property as well as that of the Government, and undertook this without any order from their commanding officer, but voluntarily and without mentioning compensation, apparently from its own desire to provide for the comfort of the troops—*held* an insufficient basis for implying an agreement that the Government would pay the cost of construction. P. 599.
57 Ct. Clms. 140, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition, after a hearing upon the merits, in an action to recover compensation under the Dent Act.

Mr. John F. McCarron, with whom *Mr. George E. Hamilton* was on the brief, for appellant.

Mr. Solicitor General Beck and *Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, appeared for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Railway Company filed its petition, under the Dent Act (March 2, 1919, c. 94, 40 Stat. 1272), to recover compensation for constructing temporary barracks for the use of United States troops under an "implied agreement" alleged to have been entered into by it with the United States, in December, 1917, through Col. Kimball, Expeditionary Quartermaster of the War Department, at Locust Point, Baltimore, Maryland, acting under the authority of the Secretary of War. The Court of Claims, after a hearing on the merits, and upon its findings of fact, dismissed the petition. 57 Ct. Clms. 140.

The material facts shown by the findings are these: The Railroad Company owned at Locust Point, a suburb of Baltimore, eight piers, which were guarded by its civilian employees. At the request of Col. Kimball, who was

in charge of the expeditionary depot at Baltimore and of the supplies arriving for shipment to Europe, the company, in October, 1917, leased one of these piers to the Government. Two of the other piers with much other property belonging to the company were destroyed or damaged by a fire supposed to be of incendiary origin. Thereupon Col. Kimball and the president of the company separately requested the Secretary of War to send a guard; the vice president of the company offering to supply a wrecking train as quarters for them. Two companies of the National Guard were sent to Locust Point, with sufficient tentage. They were quartered for a time in the wrecking train furnished by the company. Their duty was primarily to protect the government property and the piers leased by it, sending patrols throughout the railroad yard to guard cars containing its property, and generally to guard all the piers and property at Locust Point. The company, however, also maintained the civilian guards and a fire department for all of its property, whether leased or not. Later, the wrecking train having been moved away by the company, the troops moved into tents. The weather during the fall and winter was very cold and inclement. Most of the soldiers were Baltimoreans and were frequently visited by their relatives. There was some sickness among them. Their relatives complained to the railroad officials of the hardships they had to undergo in the tents; and these officials were anxious to make them as comfortable as possible. Several times in very cold weather Col. Kimball remarked to the company's agent at Locust Point, whose duty it was to confer with him on railroad matters, that the troops ought to have better quarters. On one occasion this agent suggested fitting up an unused transfer shed belonging to the company, standing near the pier that had been leased to the Government. Col. Kimball agreed that it would be a fine thing to make the men as com-

fortable as possible. He did not, however, ask that this work be done; and nothing was said about compensation. This agent having taken up with the company's officials the matter of fitting up the transfer shed, its chief engineering draftsman was directed to see as to the adaptability of the transfer shed for barracks. He made blue print plans for remodeling the shed; which he showed to the officer in command of the troops, to learn whether, in his opinion, they would satisfactorily house the troops. This officer, while not undertaking to approve the plans, suggested the amount of facilities that would be required. Nothing was said to him, however, about expense or compensation for the work. The construction of the temporary barracks was completed in the latter part of December; and the troops moved in. Two more piers were afterwards leased by the company to the Government. The barracks were occupied by the troops until May, 1919; and the piers were returned to the company in June, 1919. No government officials connected with the work at Locust Point had any authority to order the construction of the temporary barracks; and no orders were given by any of them for such construction. The subject of compensation was not mentioned in any conversations between these officers and the railroad officials until more than a week after the barracks had been completed, when the chief draftsman told the officer in command of the troops that he thought the Government should reimburse him for some of his trouble.

The Court of Claims made no finding as to the amount expended by the company in constructing the temporary barracks; the company having, as the court stated, submitted no evidence to establish the different items of its claim. In the absence of a finding as to the amount of the expenditures, as to which the company had the burden of proof, the judgment of the Court of Claims might be properly affirmed upon that ground. *Crocker* v. *United*

States, 240 U. S. 74, 82. However, as the Government does not here question the amount of the claim, we pass to its further consideration upon the merits.

Upon the findings of fact we conclude that the petition was rightly dismissed, without reference to the amount of the claim, for two reasons:

1. The Dent Act authorizes the award of compensation for expenditures connected with the prosecution of the war when they were made by the claimant upon the faith of an "agreement, express or implied," entered into by him with an officer or agent acting under the authority of the Secretary of War or of the President, and such agreement was not executed in the manner provided by law. 40 Stat. 1272, 1273; *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75, 79. The act was intended to remedy irregularities and informalities in the mode of entering into such agreements; not to enlarge the authority of the agents by whom they were made. To entitle the claimant to compensation under such an agreement it is essential that the officer or agent with whom it was entered into should not merely have been holding under the Secretary of War or the President, but that he should have been acting within the scope of his authority. It was not intended, for example, that an officer in one branch of the military service or one of inferior rank could bind the Government by an agreement as to matters relating to an entirely different branch of the service or within the control of his superior officers, as to which he had no authority whatever; or that an agreement into which he entered, although beyond his authority, should become binding upon the Government because it was made in the form of an express agreement not executed within the legal manner or of an implied agreement merely—that is, that his authority should be enlarged by the irregularity or informality with which it was exercised. See *United States* v. *North American Transportation &*

Trading Co., 253 U. S. 330, 333; and *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327.

Here, however, there is no finding that Col. Kimball had any authority to enter into the alleged agreement; and, on the contrary, such authority is negatived by the finding that none of the government officials connected with the work at Locust Point had any authority to order the construction of a temporary barracks.

Hence an essential element in the establishment of the company's claim is lacking.

2. The " implied agreement " contemplated by the Dent Act as the basis of compensation, is not an agreement " implied in law," more aptly termed a constructive or *quasi* contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement " implied in fact," founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. See, by analogy, as to the construction of similar jurisdictional statutes, *United States* v. *Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 566; *Russell* v. *United States*, 182 U. S. 516, 530; *Harley* v. *United States*, 198 U. S. 229, 234; *United States* v. *Anciens Etablissements*, 224 U. S. 309, 311, 320; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 232; *Tempel* v. *United States*, 248 U. S. 121, 129; and *Sutton* v. *United States*, 256 U. S. 575, 581; and, generally, *Railway Co.* v. *Gaffney*, 65 Ohio St. 104, 113; *Woods* v. *Ayres*, 39 Mich. 345, 350; *Hertzog* v. *Hertzog*, 29 Pa. St. 465, 468; *Knapp* v. *United States*, 46 Ct. Clms. 601, 643; and 1 Bouv. Dict. (Rawle's 3d Rev.) 660. That this provision of the Dent Act relates only to such actual agreements, implied in fact from the circumstances, is not only indicated by its purpose, as expressed in the caption, of providing relief in cases of " contracts " connected

with the prosecution of the war, but is conclusively shown by the fact that the "agreement" is described as one "*entered into,* in good faith," by the claimant, with an officer or agent of the Government, upon the faith of which expenditures have been made or obligations incurred, and which has not been executed as prescribed by law; this language aptly describing an actual agreement implied in fact, but being manifestly inapplicable to a constructive agreement implied in law.

Such an agreement will not be implied unless the meeting of minds was indicated by some intelligible conduct, act or sign. *Woods* v. *Ayres, supra,* p. 351; and cases there cited. And so an agreement to pay for services rendered by the plaintiff will not be implied when they were rendered spontaneously, without request, as an act of kindness (*Woods* v. *Ayres, supra,* p. 351); when the plaintiff did not expect payment, or under the circumstances did not have reason to entertain such expectation (*Coleman* v. *United States,* 152 U. S. 96, 99; *Lafontain* v. *Hayhurst,* 89 Maine, 388, 391); when the defendant understood that the plaintiff would neither expect nor demand remuneration (*Harley* v. *United States, supra,* p. 235); when unusual expenses were incurred, without special request or previous notice, and without any intimation or suggestion that compensation would be looked for or made (*Baltimore & Ohio R. R. Co.* v. *United States, ante,* 385); when the defendant neither requested the services nor assented to receiving their benefit under circumstances negativing any presumption that they would be gratuitous (*Railway Co.* v. *Gaffney, supra,* p. 116; 2 Abb. Tr. Ev., 3d ed., 912, and cases there cited);[1] and

[1] But an agreement to compensate the plaintiff for the use of his property will be implied when it was used by the defendant without claim of right, and the plaintiff consented to such use with the expectation of receiving compensation. *United States* v. *Palmer,* 128 U. S. 262, 269; *United States* v. *Berdan Fire-Arms Mfg. Co.,* 156

when the circumstances account for the transaction on a ground more probable than that of a promise of recompense (*Woods* v. *Ayres, supra,* p. 351.)[2]

In the present case the findings of fact show that Col. Kimball did not order the construction of the barracks; which was voluntarily undertaken by the company, without saying anything whatever about compensation, apparently from its own desire to provide for the comfort of the troops, who were guarding its property as well as that of the Government, after it had removed the wrecking train which it had offered to supply as their quarters. It does not appear from the findings that Col. Kimball requested the construction of the barracks; that the company intimated that it would expect payment from the Government or that Col. Kimball suggested that such payment would be made; or that the company in fact expected compensation. It is clear that these findings furnish no substantial basis for implying an agreement that the Government would pay the cost of the construction.

Hence, a second essential element in the establishment of the company's claim is lacking.

And the judgment of the Court of Claims is

Affirmed.

U. S. 552, 567; *United States* v. *Anciens Etablissements, supra,* p. 320. And see, as to the implied agreement to pay for property appropriated by legislative authority for a public use, without condemnation proceedings, *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330, and cases there cited.

[2] As to the character of evidence by which an implied agreement to pay for services is generally established, see 2 Abb. Tr. Ev. 913, and cases there cited.